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In The
Supreme Court of the United States
October Term, 1986

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Idaho Supreme Court on the grounds that the questions presented are so unsubstantial as not to need further argument.

I. K MART'S CHALLENGE OF AN ADMINISTRATIVE REGULATION IS MISDIRECTED BECAUSE THE IDAHO COURT EXPRESSLY REJECTED THE REGULATION AS A GROUND FOR ITS DECISION

K Mart's constitutional challenges attack an administrative regulation which was expressly rejected by the

Idaho Court as the basis for its decision. The Idaho Court held that the regulation was invalid for being inconsistent with the statute. The court said:

> While the sales tax regulations may make questionable distinctions regarding the tax consequences to advertisers using newspapers rather than third party printers, the statutory scheme makes no such distinction. Under that scheme, K Mart owes use tax on the inserts. I.C. §§ 63-3621, 63-3615(b). If a taxpayer owes tax under a statutory scheme that is constitutional, assessment of the tax pursuant to a regulation that does not comport with the constitution or with the statutory scheme does not defeat the taxpayer's statutory liability. The tax statutes are fully enforceable even if no tax regulation interpreting them exists. Statutes control interpretive regulations. To the extent a regulation is unconstitutional it is inconsistent with the constitutional statute it purports to interpret and is, therefore, of no effect to the extent of such inconsistency. *C.f.* Application of State Board of Medical Examiners, 206 P.2d 211, 214-15 (Okla. 1949) (a regulation is ineffective to the extent it is inconsistent with the statute it purports to interpret). *Even if the tax regulation is unconstitutional, or simply inconsistent with the statute, as it appears to be, K Mart remains liable under the statutory scheme.* The constitutional integrity of the applicable statutes has not been attacked. (emphasis added)

J.S. p. 7a.

Idaho follows the common rule that a regulation which is inconsistent with statutory provisions is invalid. *Rawson v. Idaho State Bd. of Cosmetology,* 107 Idaho 1037, 695 P.2d 422 (App. 1985). Accordingly, the Idaho Court looked only to the statutory provisions when it decided that K Mart was subject to Idaho use tax on its printed advertising. As a result, any federal constitutional challenge to

the Idaho Supreme Court's holding must find constitutional infirmity in the statute or its construction by the Idaho court, not an infirmity in the regulation.

The Idaho Supreme Court's decision that K Mart is taxable according to statute is the definitive interpretation of the state's law. State courts are the ultimate interpreters of state law even though their actions are subject to review under the federal constitution, treaties and laws. Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure* § 1(c) (1986). The Idaho Supreme Court, as the highest court in the state from which a decision may be had (Idaho Constitution, art. 5, § 2), sits as the ultimate adjudicator of Idaho state law which the United States Supreme Court has no power to revise. *Henry v. Mississippi*, 379 U.S. 443 (1964), Reh. Den. 380 U.S. 926 (1964), On Remand 174 So.2d 348 (1965), Motion Den. 381 U.S. 908 (1965). Determinations of Idaho state law by the Idaho Supreme Court are binding on this Court. *Williams v. Kaiser*, 323 U.S. 471 (1945).

In its effort to demonstrate a substantial federal question, K Mart would have this court invalidate a tax imposed under a valid statute based on its challenge to a regulation expressly rejected by the Idaho Court as the basis for the tax. To support this challenge as a basis for this Court's jurisdiction, K Mart cites *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), and *Allied Stores v. Bowers*, 358 U.S. 522 (1959). J.S. at 11. These cases do not support K Mart's argument.

The facts in *Iowa-Des Moines National Bank v. Bennett, supra,* were that petitioner was properly assessed tax as required by Iowa statute by the county assessor, as

had competing domestic corporations, but the county treasurer and the county auditor, in excess of their statutory authority, collected from the domestic corporations a lesser tax. After holding that the auditor's and treasurer's actions constituted state action within the ambit of the Equal Protection Clause, this Court went on to hold that: "[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines National Bank v. Bennett*, 284 U.S., at 247. Thus, the case dealt with state actions to which the petitioner was actually subjected vis-a-vis the Equal Protection Clause, and never addressed the constitutionality of the Iowa statute. In this case, K Mart was taxed under authority of the statutes and has not actually been subjected to the regulation it challenges.

The issue in *Allied Stores of Ohio v. Bowers, supra*, was whether an Ohio statute exempting from ad valorem taxation "merchandise or agricultural products belonging to a nonresident . . . if held in a storage warehouse for storage only . . ." denied appellant, a resident, equal protection. After holding that the appellant possessed standing to raise the issue because the Ohio Supreme Court upheld the exemption, this Court opined that:

> [h]ere the discrimination against residents is not invidious nor palpably arbitrary because, as shown, it rests not upon the 'different residence of the owner[1],' but upon a state of facts that reasonably can be con-

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[1] As more fully discussed later in this brief, the classification in this case turns on the distinction between sale of a service and sale of tangible personal property, rather than residency as K Mart argues.

> ceived to constitute a distinction, or difference in state policy, which the State is not prohibited from separately classifying for purposes of taxation by the Equal Protection Clause of the Fourteenth Amendment.

Id. at 530.

Clearly, this case does not support K Mart's argument because this Court, in affirming the Ohio Supreme Court, held that the nonresident tax exemption did not violate the Equal Protection Clause where the discrimination did not rest upon the different residence of the owner.

Thus, any substantial federal question for this Court's review must properly be present in the Idaho statute or the Idaho Court's interpretation of it, to which K Mart was actually subject, not the regulation to which it was not subject.

As we shall show in this brief, neither the statute nor the interpretation suffer from the defects which K Mart attributes to the regulation. Any federal constitutional challenges directed at this statutory scheme of taxation are both unsubstantial and correctly resolved below.

II. APPLICATION OF THE IDAHO SALES TAX ACT TO K MART'S PRINTED ADVERTISING

The Idaho Sales Tax Act (Chapter 36, Title 63, Idaho Code, hereafter "the Act") imposes a general retail sales tax supplemented by a complementary use tax. The Act generally taxes tangible personal property used by K Mart in the furtherance of its business activities, in this instance printed advertising materials used to promote products which it holds for sale. Contrary to K Mart's assertions, this tax applies regardless of whether the advertising is

printed in Idaho or outside Idaho. It therefore does not discriminate against interstate commerce. Nor does it violate equal protection requirements because all similarly situated taxpayers are similarly taxed. Any person who purchases printed advertising at retail, that is for any purpose other than resale in the regular course of business, is subject to the same tax (absent some statutory exemptions which are neither relevant nor challenged in this case). However, in common with most state sales tax laws, the tax does not generally extend to purchases of services when the purchase does not include the transfer of ownership of any tangible personal property. For this reason, a purchase of advertising space in a newspaper is not taxed. In such a case, the advertiser acquires no title, possession or interest in tangible personal property. Finally, because the tax is one of general application, it does not offend freedom of the press.

A. THE TAX IMPOSED ON K MART'S ADVERTISING DOES NOT VIOLATE THE COMMERCE CLAUSE

The Idaho Sales Tax is imposed on the retail sale of tangible personal property. Idaho Code § 63-3619 (1986 Cum. Sup.).[2] A retail sale occurs when the purchaser buys the property for any purpose other than the resale of that property in the regular course of its business. Idaho Code § 63-3609 (1986 Cum. Sup.).[3] In common with

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[2] Sec. 63-3619 provided at the time relevant here: "An excise tax is hereby imposed upon each sale of retail at the rate of three percent (3%) of the sales price of all property subject to taxation under this act . . ."

[3] Sec. 63-3609 provides: "The term 'retail sale' or 'sale at retail' means [sic] a sale of tangible personal property for any purpose other than resale of that property in the regular course of business . . ."

all other states imposing a general sales tax, Idaho also imposes a complementary use tax on the "storage, use or other consumption" on tangible personal property in the state. Idaho Code § 63-3621 (1986 Cum. Sup.).[4] The use taxes apply when the retail purchase of the property has escaped sales tax, usually because the property was purchased outside the state.[5] This general pattern of sales tax with a complimentary use tax is unquestionably constitutional. *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

K Mart complains that the tax imposed on it is violative of the commerce clause because under the regulation it challenges there would be no tax on the same product printed and distributed by Idaho newspapers. J.S. p. 19. This contention is fallacious because under the statute and the Idaho Court's decision below, as opposed to the regulation, advertising printed in Idaho is taxed in the same manner as advertising printed outside the

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[4] Sec. 63-3621 provides: "An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1965, for storage, use, or other consumption in this state at the rate of four percent (4%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property." As with the sales tax (see note 1), the rate in effect at the time relevant to this case was 3%. *Supra* at note 2.

[5] *McCorville v. State Board of Equalization*, 85 Cal.App.3rd 156, 149 Cal.Rptr. 194 (1978); *Bank of America Nat. Trust & Savings Assoc. v. State Bd. of Equalization*, 209 Cal.App.2nd 780, 26 Cal. Rptr. 348 (1963); *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, 140 A.2d 479 (1958); *Southwestern Bell Tel. Co. v. State Comm. of Revenue and Taxation*, 168 Kan. 227, 212 P.2d 363 (1949); 9 *Vanderbilt Law Review*, 348, 351 (1955-56) 129 ALR 222, 223, s. 153 ALR 609.

state. It is this statutory provision, not the regulation, which is the controlling state law in this case.

The Commerce Clause prohibits a state from imposing a tax which discriminates in favor of in-state taxpayers over those from outside the state. See, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); and *Northwestern Portland Cement Co. v. Minnesota*, 358 U.S. 450, 451 (1959).

Nothing in this statutory scheme applied by the Idaho Supreme Court imposes a tax burden on non-Idaho business which is greater than the burden imposed on Idaho business conducting the same activity. Had K Mart purchased its printed advertising from an Idaho printer, the purchase of this property would have been subject to the Idaho sales tax under Idaho law. Idaho Code § 63-3612 (1976).[6] Because K Mart, in fact, purchased the printing from a printer outside of Idaho before causing it to be brought into the state, the complementary use tax be-

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[6] Sec. 63-3612 provides: "The term 'sale' means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration and shall include any transfer of possession through incorporation or any other artifice found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, an exchange or barter. 'Sale' shall also include: (a) Producing fabricating, processing, *printing, or imprinting of tangible personal property* for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting. . . . (d) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or *printed* to the special order of the customer, *or of any publication*. . . ." (emphasis added)

comes applicable. Idaho Code § 63-3621, *supra* note 4. If K Mart had paid a sales tax to the state in which the printer was located, that tax would be applied as credit against the Idaho use tax. Idaho Code § 63-3621(k) (1986 Cum. Sup.).[7] Because no tax was applied in the state where the property was purchased, the full Idaho use tax applies. Thus, had the same printing been purchased by K Mart from an in-state printer, it would be subject to the same tax as is the printing actually purchased from an out-of-state printer and imported to the state for use in the state.

The only thing which makes this case appear confusing is the manner in which K Mart has chosen to contract for the distribution of its advertising. It has contracted with various newspaper publishers (who necessarily have existing home distribution systems to distribute their own product) to distribute the advertising. K Mart has purchased a service from the newspaper. The newspaper also offers another service which K Mart could have purchased but did not. That is K Mart could have had its advertising printed in the pages of the newspaper itself. The purchase of such advertising is not subject to Idaho sales or use tax because it is not a purchase of tangible personal property. This is true regardless of whether the newspaper involved is published and dis-

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[7] Section 63-3621(k) provides: "When the tangible personal property subject to use tax has been subjected to a general retail sales or use tax by another state of the United States at a rate equal to or greater than the rate of the Idaho tax, and evidence can be given of such payment, the property will not be subject to Idaho use tax. If the rate paid the other state was less, the property will be subject to use tax to the extent that the Idaho rate exceeds the rate of the other state. . . ."

tributed in Idaho or published in another state and distributed in Idaho. Thus advertising purchased from a newspaper is excluded from tax both when the newspaper is published in Idaho and when the newspaper is published outside of Idaho.

It is apparent, therefore, that under this statutory scheme both in-state and out-of-state printing businesses are treated equally. So too are in-state and out-of-state newspapers. The statutory scheme imposes no burden on interstate business not also imposed on the same activities conducted in the state. Exclusions from the tax extend equally to similar in-state and out-of-state businesses. Any implication contained in the administrative regulation to the contrary is inconsistent with this statute and was correctly ignored by the Idaho court. It necessarily follows that there is no discrimination between intrastate and interstate commerce which can be the subject of of Commerce Clause challenge.

B. THE TAX IMPOSED ON K MART'S ADVERTISING DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

There is an undeniable classification inherent in this system. That is, advertising purchased from a third party printer and then distributed to potential customers by a contracted delivery service (in this case newspaper publishers) is subject to Idaho's sales or use tax while advertising space purchased in a newspaper is not subject to tax payable by the advertiser. However any federal constitutional equal protection challenge based on this classification is both unsubstantial and without merit.

The question, of course, is *not* whether a state's tax laws may create classifications with different tax results.

The question instead is whether this specific classification has a recognizable foundation which this Court may conclude is a legitimate basis for supporting it. This Court has historically refused to substitute its own judgment to determine which alternative methods of taxation may be the most fair and equitable.

This Court has expressed the appropriate standard in many cases. In *Idaho Department of Employment v. Smith,* 434 U.S. 100 (1977), this Court held:

> This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" [citations omitted]

Id. at 101.

In *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959) this Court held:

> The applicable principles have been often stated and are entirely familiar. The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different spe-

> cific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [citations omitted] "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co. v. Conway, supra,* 281 U.S. at 159.

Id. at 526-527.

In *Madden, Executor v. Kentucky,* 309 U.S. 83 (1940), this Court said:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. [footnote omitted] This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' [footnote omitted] and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. *It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.* [footnote omitted] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the pesumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. [footnote omitted] The burden is upon the one attacking the legislative arrangement to negative *every conceivable basis* which might support it. [footnote omitted] [emphasis supplied]

Id. at 87-88.

In *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) Reh. Denied 411 U.S. 910 (1973), this Court stated:

> The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966). Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled [footnote omitted], the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

Id. at 359.

Finally, *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), reaffirmed the often stated rule that a "... distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it ..." *Id.* at 357. *See also, Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580 (1935); *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61 (1913); *Carmichael v. Southern Coal Co.,* 301 U.S. 495 (1937).

The classification in this case distinguishes between advertising printed in a newspaper and advertising purchased from a third party. This is a rational distinction which presents no substantive equal protection issue for this Court to decide.

In one situation, the newspaper prints advertising which is distributed with its own product to the public. The advertiser is paying the newspaper for advertising services. Ownership and control over the tangible personal property is maintained by the newspaper until it is sold to

its customer. The advertiser never purchases or owns the property.

In the second situation, a third party printer prints the advertising pursuant to a contract with the advertiser and ships it to a newspaper publisher pursuant to the same contract. In short, the advertiser buys the property from the printer and then pays the newspaper to deliver the advertiser's property to the public.

The different tax consequences of these two situations are squarely based on very different legal and economic differences between the parties. The transaction taxed involves the transfer of ownership of property—i.e., the printed advertising. The transaction not taxed involves no transfer of ownership of tangible personal property between the parties to the contract. Because the Idaho sales tax, like most state sales taxes, focuses on the purchase and use of tangible personal property, a distinction which taxes the sale or use of such property while not taxing purchases of services or intangibles, is fundamental to the operation of the system. None of this property actually escapes taxation in the hands of its final purchaser. Both the retail purchase by a reader of a newspaper and the retail purchase by K Mart of its printed advertising are subject to the same Idaho tax. See Idaho Code § 63-3612 (1976) *supra* note. 6. Only transactions not involving a retail sale of tangible personal property are excluded from tax. Accordingly, the fact that different tax consequences result between these economically and legally different transactions is not the basis for a substantial federal equal protection challenge.

C. TAXING K MART'S PRINTED ADVERTISING DOES NOT VIOLATE K MART'S FREEDOM OF EXPRESSION

It is clearly established that freedom of the press does not mean freedom from all taxation. This Court has held:

> It is beyond dispute that the States . . . can subject newspapers to generally applicable economic regulations without creating constitutional problems. [citations omitted]

Minneapolis Star and Tribune, Co. v. Minn. Commissioner of Revenue, 460 U.S. 575 (1983).

Idaho's sales and use tax is a general system of taxation imposed on those who purchase and use tangible personal property. Printed materials are expressly included in the scope of the tax. See, *supra* note 6. K Mart's attempt to cast Idaho's tax in the role of taxing some forms of speech while exempting others is a distortion disguised by the narrow focus of the argument. This narrow focus ignores the general fact that retail purchasers of both kinds of printed material pay the same tax along with retail purchasers of most other tangible personal property.

When K Mart purchases printed avertising from a printer a retail sale occurs. K Mart never resells the advertising. Instead, the material is used to further K Mart's business. K Mart pays a distributor (in this case newspapers) for the service of placing the advertising into possession of potential K Mart customers.

A newspaper is also purchased at retail by a newspaper reader who uses the newspaper for his own purposes.

Both of these retail purchasers pay the same tax on their purchase of property. Neither the newspaper nor the printed advertising is treated discriminatorily.

Cases in which this court have stricken state taxes as violating first amendment freedom of press are easily distinguishable. Both *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936) and *Minneapolis Star and Tribune Co. v. Minn. Commissioner of Revenue, supra,* struck down taxes which expressly singled out a narrow part of the newspaper industry with apparent censorial intent or effect. These defects are not present here both because all printed material is similarly taxed and the tax is part of a general system of taxation which does not single out the newspaper or printing industry. Nor is this case similar to *Arkansas Writer's Project, Inc. v. Ragland,* No. 85-1370, presently pending before this Court. While the Arkansas statute provides an exemption for some printed publications and not others—the Idaho statute, as we have shown, does not.

Thus, the tax imposed on K Mart for its use of its printed advertising in Idaho is a proper application of a general system of taxation. There is no specific focus on the treatment of any form of expression. All forms of printed material are taxed equally based on their purchase price. This statutory system presents no substantial freedom of expression issue.

III. THERE IS NO SPLIT OF AUTHORITY AMONG STATES ON ANY SUBSTANTIAL FEDERAL ISSUE.

The courts of several states have reached different results about the application of state sales and use taxes to printed advertising similar to that at issue here. These differences result from different state statutes or interpretations of the meaning of those statutes. These cases

do not represent a split of authority on federal constitutional issues. It follows that there is no need for this Court to resolve any such differences.

K Mart argues that the issues it presents have generated conflicting decisions from various state courts, and that such divergence of opinion requires resolution by this Court. J.S. pp. 21-22. However, a review of the cases cited by appellant reveals that the conflict is not of a constitutional magnitude requiring this Court's attention. Resolution of each case turned upon whether or not the respective court defined the term "newspaper" so as to include advertising supplements, whether printed in-state or out-of-state. *See: Appeal of K Mart Corp.*, 238 Kan. 393, 710 P.2d 1304 (1985) (interpreting Kan. Stat. Ann. § 79-3606(m) (1986 Cum.Sup.)); *Caldor, Inc. v. Heffernan*, 183 Conn. 566, 440 A.2d 767, 25 A.L.R. 4th 740 (1981) (interpreting Conn. Gen. Stat. § 12-412(f), now Conn. Gen. Stat. § 12-412(6) (1985)); *Daily Record Co. v. James*, 629 S.W.2d 348 (Mo. En Banc 1982) (interpreting Mo. Rev. Stat. § 144.020.1 (1986), and § 144.030.3(7) currently codified at § 144.030.2(8) (1986)); *Eagerton v. Dixie Color Printing Corp.*, 421 So.2d 1251 (Ala. 1982), As Corrected on Denial of Rehearing (1982) (interpreting Ala. Code § 40-23-2(1) (1985)); *K Mart Corp. v. S.D. Dept. of Revenue*, 345 N.W.2d 55 (S.D. 1984) (interpreting S.D. Codified Laws Ann. § 10-46-2 (1982) and § 10-45-12.1 (1986 Cum. Sup.)); *Ragland v. K Mart Corp.*, 274 Ark. 297, 624 S.W. 2d 430 (1981) (interpreting Ark. Stat. Ann. § 84-1904(f) (1980) and § 84-3106(B) (1980); *Sears, Roebuck & Co. v. State Tax Commission*, 370 Mass. 110, 345 N.E.2d 897 (1976) (interpreting Mass. Ann. Laws ch. 64H, § 6(m) and ch. 64I, § 7(b) (Michie/Law, Co-op 1978); *Sears, Roebuck*

& Co. v. Woods, 708 S.W.2d 374 (Tenn. 1986) (interpreting TCA § 67-6-329(a)(3) (1986 Cum. Sup.)); *Wis. Dept. of Revenue v. J.C. Penney Co.*, 108 Wis.2d 662, 323 N.W.2d 168 (App. 1982) (interpreting Wis. Stat. Ann. § 77.54(15) (West 1986 Cum. Sup.)). In other words, the definition of the term newspaper did not depend upon any invidious classification forbidden by the Equal Protection Clause; rather, the definition depended upon whether the respective court concluded that advertising supplements constituted one of the components of a newspaper. The conflict among the cited cases is that some jurisdictions defined a newspaper to include advertising supplements whereas other jurisdictions did not.

Once the respective courts determined what components comprise a newspaper, each court uniformly applied either the applicable tax statute or tax exemption. In none of the cited cases did the respective court strike down the statute under which the taxing authorities sought to impose the tax, or the exemption under which the taxpayer sought refuge. With the resolution of the definition of the term newspaper, no constitutional challenges to the tax statute, or exemption, remained. Hence, the conflict among the cited cases does not rise to a constitutional level.

Not only do these cases fail to support K Mart's argument, they do not directly relate to any issue in this case. While these cases dealt with the definition of a newspaper, this case centers around the imposition of Idaho's use tax on K Mart's consumption of tangible personal property, i.e., printed advertising. As we have shown, K Mart consumes the printed advertising it purchases from the print-

er,[8] regardless of whether or not the printer resides in-state or out-of-state. Having purchased the advertising supplements, appellant, or any other advertiser opting to do so, hires the services of the chosen newspaper's extensive distribution system. *Caldor, Inc. v. Heffernan,* 183 Conn. at 574, 440 A.2d, at 771, 25 A.L.R. 4th at 746; *Sears, Roebuck & Co. v. Woods,* 708 S.W.2d, at 379.

Concerning any possible implication of the freedoms guaranteed by the First Amendment, none of the cited cases illustrate any conflict among various state court decisions. A cursory review of these cases quickly reveals that none of the cases turned on First Amendment analysis. Hence, no conflict. On a more fundamental level, none of these cases, nor the present case, implicate the First Amendment guarantees because the incidence of the tax, not falling, directly or indirectly, on any newspaper, is not " . . . a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Grosjean v. American Press Co.,* 297 U.S. at 250 (1936).

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[8] Appellant concedes, as it also did in *Appeal of K Mart Corp.,* 238 Kan. 393, 710 P.2d 1304 (1985), that it properly owes tax on supplements purchased from printers to be used at its stores by both employees and customers. This situation bears little, if any, difference from the contested scenario where K Mart purchases advertising supplements and then makes use of a newspaper's extensive distribution system. *Caldor, Inc. v. Heffernan,* 183 Conn. 566, 574, 440 A.2d 767, 771, 25 A.L.R. 4th 740, 746 (1981).

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CONCLUSION

For the reasons stated herein, this appeal should either be dismissed or the decision of the court below should be affirmed.

DATED this 27 day of February, 1987.

Respectfully submitted,

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